

O'ahu Island Burial Council
State Historic Preservation Division
601 Kamokila Blvd, Room 555
Kapolei, HI 96707

October 18, 2009

Leslie T. Rogers
Regional Administrator
US Department of Transportation
Federal Transit Administration, Region IX
201 Mission St, Suite 1650
San Francisco, CA 94105-1839

Dear Mr. Leslie Rogers:

The O'ahu Island Burial Council appreciates the opportunity to offer our final set of comments regarding the draft programmatic agreement (PA) for the Honolulu High-Capacity Transit Corridor Project (Project).

Before presenting our final comments, we would like to acknowledge to the FTA our sincere thanks for the efforts of the Honolulu City and County's Project team, particularly Faith Miyamoto and Lawrence Spurgeon, who have dedicated many hours to consulting with the OIBC and its Rail Transit Project Task Force.

The OIBC would also like acknowledge to the FTA our great appreciation of Mayor Mufi Hanneman's heartfelt letter of October 13 that commits the City and himself personally to work together with the OIBC to "find ways to best protect iwi kūpuna."

Divergent OIBC and City perspectives

Unfortunately, a significant divide remains between the City's and the OIBC's perspectives regarding how to "best protect iwi kūpuna." The OIBC's view focuses on early identification of iwi kūpuna to facilitate a strategy of avoidance through the consideration of alternate alignments. The City's view focuses on early

commitment to a given alignment and later identification of iwi kūpuna, employing a strategy of mitigating the negative impacts on iwi kūpuna through design changes in the designated corridor.

Early problems with the Project that undermine the current PA

During consultation meetings on the PA and in meetings with the Project team, the OIBC has consistently raised concerns about the process and outcome of the Alternatives Analysis (AA) conducted by the City in selecting its Locally Preferred Alternative (LPA). These concerns have not been allayed by the outcomes of the PA consultation.

The City committed itself to an LPA without first conducting an archaeological inventory survey (AIS), even with its recognition that the selected LPA would, in its Phase 4 alignment, traverse an area under which lies a natural sand deposit that is well known to house high concentrations of unmarked Native Hawaiian burials.

Relevant Hawaiian cultural perspectives

In Hawaiian culture, a burial is kapu (sacred and off-limits). Families would kanu (bury or plant) a deceased loved one with the understanding that the person's full life cycle would continue. Upon being "planted," the iwi (bones)—and the 'āina (land) that nurtured the iwi—in time would become one. The individual's mana (spiritual power), retained in his bones, would imbue the 'āina and provide a source of mana for the community associated with that 'āina. In this way, kūpuna (grandparents, ancestors) continue their kuleana (role, responsibility, obligation, and right) to spiritually nourish their families and 'āina. The kuleana of the living descendants is to maintain the sanctity of the iwi kūpuna (ancestral remains), thus preserving the integral relationships among their ancestors, the 'āina, and the living community.

The act of burial and burial locations were kept huna (secret and hidden). Burials were kapu, intended to be left in peace, and carefully guarded to ensure that no disturbance occurred. Intrusions into burials (opening up the ground to expose iwi kūpuna, touching iwi kūpuna, uprooting iwi kūpuna, etc.) was considered extremely offensive and disrespectful—an act of violence and degradation directed at the deceased individual, the living family members, and the larger community associated with that burial. Such an act would be akin to disrobing a living person and physically handling them against their will.

Hence, even the possibility of the archaeological inventory survey that might encounter iwi kūpuna through careful hand excavation is worrisome for Native Hawaiians. More troubling is the thought of archaeological investigation via backhoe excavation. And worse still is the notion of inadvertent intrusion into burials and destruction of iwi kūpuna by high-powered, modern construction tools.

Legal Standing of the OIBC

Understanding the vulnerability of iwi kūpuna in our modern context that is framed by a history of Native Hawaiian depopulation and dispossession at the hands of Western powers that be,¹ the State of Hawai'i in 1990 enacted legislation to protect iwi kūpuna—laws that place a heavy kuleana on the various island burial councils.

One of the most important statutory roles of the OIBC is determining treatment of unmarked Native Hawaiian burials 50 years or older that are documented through means such as an AIS. The OIBC has the authority provided in the Hawai'i Revised Statutes (HRS) Chapter 6E-43.5(f) to “determine the preservation or relocation of previously identified native Hawaiian burial sites” and to “make recommendations regarding appropriate management, treatment, and protection of native Hawaiian burial sites, and on any other matters relating to native Hawaiian burial sites.”²

As a statutorily-empowered body of governor-appointed officials knowledgeable and experienced in cultural, legal, archaeological, and planning matters, the OIBC has a particularly important voice in projects that have encountered or are likely to encounter unmarked Native Hawaiian burials, as with the City's Rail Transit Project (Project).³

Failure of the City to consult with the OIBC in the AA process

This is why the OIBC was astounded to discover a gross lack of consultation with the OIBC in the interim between when City representatives first came to the OIBC

¹ A crucial episode of dispossession occurred under an armed invasion by the United States marines, which enabled the overthrow of the sovereign and diplomatically-recognized Hawaiian Kingdom government that had protected burials through stringent laws. (See the Hawaiian Apology Bill, PL 103-150 for further details regarding the US' role in the illegal overthrow of the Hawaiian Kingdom government.)

² The OIBC's role is more specifically outlined in the Hawai'i Administrative Rules 13-13-300, Subchapter 3.

³ The OIBC notes here that it continues to object to the FTA's assessment that our statutory role does not rise to the level to prompt the FTA to include the OIBC as an invited signatory.

in 2005 to initiate consultation with the OIBC and when the OIBC leadership requested City representatives to appear before the OIBC on July 9, 2008, to update our body. In the interim, the City selected an LPA absent OIBC consultation. Though the Project team held public hearings regarding their selected LPA, the OIBC did not receive an invitation to these and was never briefed about the hearings through written correspondence or through a representative sharing such information at an OIBC monthly meeting.

The OIBC was further shocked to learn that the City—without a properly executed AIS—selected an LPA that included, in its Phase 4 segment, an area under which lies a natural sand deposit that is well known to house high concentrations of unmarked Native Hawaiian burials.

The minutes of the OIBC's July 9, 2008 meeting record our concerns regarding the process and outcome of the LPA decision:

Council members were very concerned that the 106 process has been skirted by postponing the AIS. Without a complete survey, the extent of the effect cannot be adequately determined in making a decision in the choice of alignment. Abad was concerned that the alignment has been determined in advance of the AIS and therefore the process has been short circuited...

Lack of adequate and appropriate information for the City to render its LPA decision

What has become apparent in subsequent PA consultation meetings is that the City relied on other archaeological studies in the general Phase 4 region to surmise that its LPA would pose less of a danger to iwi kūpuna than other potential alignments. The City's conclusion was based on a fallacy of assuming that a lack of previous archaeological studies in the LPA alignment was an indicator of a lesser number of iwi kūpuna being present in that alignment as compared to other possible alignments. The City made its crucial LPA decision without the information that should have been provided in an AIS (even a preliminary one that could have been contracted) and lacking input from OIBC consultation.

Had the OIBC been included in the LPA discussion, the OIBC would certainly have pointed out to the City's decision makers the error of the aforementioned fallacy and conveyed the OIBC's archaeological and Hawaiian cultural expert opinion that the selected LPA would certainly threaten a large number of iwi kūpuna.

Further, if the OIBC had been consulted when the LPA was being determined, the OIBC would have been able to explain how the Project's potential disturbance of iwi kūpuna would impact Native Hawaiians, deceased and living—a point significant to the evaluation of the burials against the National Park Service's standards for identifying the eligibility of traditional cultural properties for inclusion on the National Register of Historic Places.

During the PA consultation meetings, the Project team members commented several times that the cultural perspectives relating to iwi kūpuna that OIBC members brought forth were completely new to them and that they had not previously understood our full concerns. It was the first time that they began to understand that their view of “respectful treatment” of iwi kūpuna from their Western cultural perspectives was nonetheless highly disrespectful treatment from a Hawaiian cultural perspective.

In sum, when the City evaluated the Project's impacts to iwi kūpuna in its AA, it did so without adequate archaeological or cultural information that should have been presented in an AIS and that would have allowed the City to appropriately weigh alternatives.

Significance of the City's failure to conduct an AIS of Phase 4

In relation to legal procedures relevant to the PA, the most important missing information from the AA was data that should have been provided in an AIS, especially involving Phase 4 where the City was aware that iwi kūpuna would be present.

By avoiding the AIS, the City has diminished protections afforded iwi kūpuna in Hawai'i State law and in federal legislation, particularly the 1966 Department of Transportation Act of 1966, Section 4(f). The rigorous alternatives analysis and avoidance measures required by Section 4(f) can only be afforded historic properties (such as the cumulative set of Native Hawaiian burial sites in the Downtown Honolulu and Kaka'ako corridor) if an appropriate investigation (such as an AIS that includes an investigation of traditional cultural properties) identifies and documents such properties.

Significantly, the National Park Service Bulletin, Guidelines for Evaluating and Document Traditional Cultural Properties (pp. 11-12) describe several important

criteria qualifying TCPs as eligible for inclusion on the National Register of Historic Places, each of which the Native Hawaiian burials in the Project area would meet:

- 1) “The entity evaluated must be a tangible property.”
- 2) The property must possess integrity of relationship to a cultural group, or more specifically, the “the property [must be] known or likely to be regarded by a traditional cultural group as important in the retention or transmittal of a belief, or to the performance of a practice” (as with traditional Hawaiian practices associated with the care of iwi kūpuna and the role that such kūpuna play in the lives of an associated living community).
- 3) The property must possess integrity of condition, which is measured by the perspectives of the cultural group associated with the property. The Guidelines’ authors specifically note that “the integrity of a possible traditional cultural property must be considered with reference to the views of traditional practitioners; if its integrity has not been lost in their eyes, it probably has sufficient integrity to justify further evaluation.” In this regard, a specific example was provided by the Guidelines’ authors of a cemetery whose integrity was maintained in the eyes of the African Baptist community associated with it, regardless of the cemetery having been “buried under fill and modern construction for many decades.”
- 4) The property must meet one of the 36 CFR 60.4 criteria, as with Native Hawaiian burials that “may be likely to yield information important in prehistory or history,” though this would not be the reason that Native Hawaiians would consider burials as being significant.

If an AIS, including a study to investigate traditional cultural properties, were to be conducted for the City’s proposed Project, it is clear that concentrations or cumulative sets of Native Hawaiian burials would be eligible for inclusion in the National Register of Historic Places.

Therefore, the City’s failure to conduct such studies to bring to light the presence and significance of burials in the Project’s alignment has needlessly placed iwi kūpuna in harm’s way and diminished the ability of laws such as the DOT Section 4(f) to protect them.

OIBC's stance

It is for all of the above reasons that the OIBC voted unanimously at its October 14, 2009 meeting not to sign the PA as a concurring party. The OIBC, in all good conscience, cannot be a supportive party to an agreement that is founded on the assumption that the City's AA included appropriate consultation or that the AA was based on current and thoroughly-researched data, including information on historic properties. Neither is true. The aforementioned missing archaeological and cultural assessments created fatal flaws in the City's AA and LPA choice.

Phased AIS not automatically allowed in CFR 800.4

In response to the above concerns that OIBC members have repeatedly raised, the City and its contractors have responded by saying that CFR 800.4(b)(2) allows for a phased approach to defer identifying and evaluating historic properties for large projects. However, this deviation from the normal process of identifying, documenting, and evaluating historic properties affected by an undertaking *before* the undertaking commences, can only be approved "if it is specifically provided for in a memorandum of agreement executed pursuant to §800.6, a programmatic agreement executed pursuant to §800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to §800.8."

OIBC's appeal to signatories and consulting parties

We therefore implore the PA signatories, invited signatories, and consulting parties to deny the deferral of the AIS. Instead, we ask that the parties require the findings of an AIS to be incorporated in the FEIS and that this requirement be stipulated in the PA.

Should the findings of such an AIS require a Section 4(f) evaluation, and should those findings compel the City and FTA to conduct a related AA, we further beseech the PA signatories and invited signatories to require such an AA in the FEIS and that such studies be properly completed before a record of decision is issued.

If the current draft PA that allows for the deferral of the AIS is approved, it will set a troubling precedent that communicates the following:

- 1) The PA signatories and concurring parties condone a plan that diminishes the protections afforded Native Hawaiian burials and other historic properties in state and federal laws.

- 2) A federal agency can disregard a governor-appointed local commission charged with the protection of historic properties of utmost significance to the Native Hawaiian community.
- 3) The City can commit a massive public project to a route that would have tremendous harmful impacts on Native Hawaiians without the purposeful, invited input of the Native Hawaiian community in that decision and without first having investigated the potential impact of the undertaking on historic properties, including Native Hawaiian burials.
- 4) The City can circumvent the historic preservation process that it requires private-sector developers to follow.

Suggested PA amendments

Should a PA nonetheless be approved that allows for an AIS to occur *after* the required approvals for the Project's commencement, then the OIBC would request that the following changes be added to the PA:

- 1) A set of "whereas" clauses that we hope will buffer the OIBC and the Native Hawaiian community from future critics who we foresee will blame the OIBC and Native Hawaiian community for what will inevitably be significant delays and cost increases associated with iwi kūpuna laid to rest in the corridor of the City's selected LPA:
 - a. Whereas, there is a high likelihood of the discovery of iwi kūpuna along the transit route, particularly in Phase 4;
 - b. Whereas, this agreement is being signed prior to the completion of an archaeological inventory survey despite repeated requests for one by the O'ahu Island Burial Council (OIBC) and Native Hawaiian organizations;
 - c. Whereas, the OIBC and Native Hawaiian organizations have requested that the likely impact to burial sites be considered as part of the alternatives analysis;
 - d. Whereas, the city and the FTA assume the risk that the OIBC and the State Historic Preservation Division may bar the relocation of iwi along the transit route, thereby delaying and increasing the cost of the undertaking and potentially jeopardizing the viability of the project.
- 2) A commitment by the City to include in the AIS Plan a thorough 100 percent subsurface investigation by archaeological excavation (rather than ground penetrating radar that would be ineffective in sand deposits) of every area to

- be affected by ground disturbance, including, but not limited to, column locations, stations, traction power substations, and utility relocations.
- 3) Inclusion of the OIBC in decisions regarding the approval of the AIS Plan, AIS, Archaeological Monitoring Plan, and Burial Treatment Plan.

Honoring a debt of gratitude

So much of what we enjoy in Hawai'i originates from Native Hawaiian kūpuna—beautiful cultural traditions and practices that are appreciated worldwide, a host culture that welcomes diversity and cross-cultural tolerance, resource stewardship practices that offer solutions to current global concerns, a spiritual depth that continues to inspire and evoke inquiry... We owe these kūpuna the basic respect of fully considering their desire to rest in peace. The OIBC cannot agree to a project plan that has placed our kūpuna as a secondary after thought in the planning process.

We respectfully submit these comments and request that the FTA, other signatories, and consulting parties give full consideration to the points we have presented.

‘O mākou iho nō me ka ‘oia‘i‘o,

Kāwika McKeague
OIBC Chair

Hinaleimoana Falemei
OIBC Vice Chair

Kēhaunani Abad
OIBC Rail Transit Task Force Chair